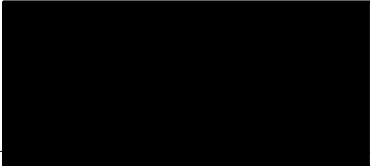




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MDV/163634

The attached proposed decision of the hearing examiner dated July 20, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed January 27, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on March 19, 2015, at Waukesha, Wisconsin.

The issue for determination is whether \$55,115.63, which was placed in an irrevocable trust on December 9, 2014, is a divestment when there was a promissory executed from the trust to the petitioner on the same date.

On May 15, 2015 I issued a decision dismissing the petitioner's appeal. I concluded that the statute and policy sections related to promissory notes did not apply to this case because \$55,115.63 was transferred into an irrevocable trust. Pursuant to the Medicaid handbook, App. 17.13.3. funds added to an irrevocable during the five year look back period are a divestment.

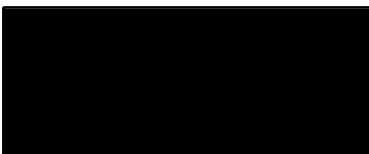
On May 20, 2015 the petitioner submitted a rehearing request. The rehearing request stated that it was a "fundamental error in law" not to consider that the promissory note met all of the requirements under state and federal statutes. They argued that this created a fair market value consideration for the transfer, and therefore it was not a divestment.

On June 17, 2015 I granted the rehearing request. I am issuing this decision proposed because the promissory note regulations and policies, if applicable, appear to be in conflict with the policy stating that any transfer of funds to an irrevocable trust is a divestment.

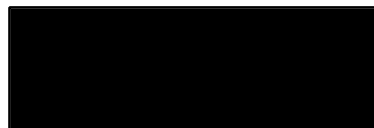
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:
Corinne Balter
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On December 9, 2014 the petitioner transferred \$119,115.93 from a [REDACTED] account to the [REDACTED] Irrevocable trust.
3. On December 9, 2014 a promissory note was executed from the [REDACTED] Irrevocable trust to the petitioner in the amount of \$55,115.63. The promissory note had a .34% interest rate per annum, and provided for payments back to the petitioner in the amount of \$6200 per month beginning on January 9, 2015 and ending on September 9, 2015.
4. On December 22, 2014 E.R. sent a letter to Waukesha County economic support stating the following:

On 12-9-14 [the petitioner] transferred money from [REDACTED] to Irrevocable account at [REDACTED]. The amount was \$119,115.93. Of this amount \$55,115.63 was loaned with a promissory note, that starts paying back on 1/9/15.

The remaining balance is \$64,000.30, this is the divested amount.

We are looking for a NOD [Notice of Decision] showing the penalty period for the \$64,000.30.
5. On January 22, 2015 the agency sent the petitioner a notice stating the entire \$119,115.93 was a divestment, and that her penalty period was from 12/1/14 through 4/5/16.
6. On February 2, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

DISCUSSION

When an individual, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(a)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. This transfer is defined as a divestment. *Id.* The divestment must occur during the five year look back period. Wis. Stat. § 49.453(1)(f)(2m). Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment. The divestment penalty period is the determined by dividing the value of property divested by the average monthly cost of nursing facility services. Wis. Stat. § 49.453(3); *MA Handbook*, App. 17.5.

In this case the petitioner transferred money from a bank account to an irrevocable trust and executed a promissory note from the irrevocable trust to herself. This promissory note allowed for monthly

payments in the amount of \$6200 to the petitioner with a .39% yearly interest rate. The payments were from January 2015 through September 2015.

I note that this promissory note only included a portion of the money transferred. The promissory note was for \$55,115.63, however, a total of \$119,115.93 was transferred from the bank account to the irrevocable trust. The petitioner admits that there is a divestment in the amount of \$64,000.30.

When one considers this case and whether this is a transaction for less than fair market value, it is important to consider the divestment period on the admitted divestment of \$64,000.30. This divestment period very closely coincides with the length of payments on the promissory note. In other words the monthly payments from the promissory note plus any additional income cover the petitioner's nursing home care during the divestment period. At the end of this divestment period Medicaid coverage begins, and \$64,000.30 remains in the [REDACTED] irrevocable trust. This is money that was originally transferred from the petitioner's bank account to the [REDACTED] Irrevocable trust, which then will never have to be used to pay for the petitioner's care. The effect of the petitioner's actions is to shorten the divestment period while shielding a large portion of her assets. She offers no legitimate reason for this transfer and promissory note.

It is clear that Petitioner hoped to take advantage of her creative Medicaid planning to become eligible for Medicaid despite her having ample resources that could have been used to pay for her institutional care. She attempts to defeat the Congressional purpose in addressing divestment in 1985. The House Committee on Energy and Commerce stated the following in its report:

The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

H.R. REP. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985)

Not only would her scheme have been unacceptable to that Committee it is unacceptable to the State of Wisconsin. Fortunately, it will not succeed.

Petitioner would have us believe that if her promissory note meets the requirements under § 49.453 specifically relating to promissory notes, that is the end of the story. I disagree. For two reasons I conclude that the policy and statute related to promissory notes do not control the outcome in this case because the money was transferred to an irrevocable trust.

First, *Buettner v. Wisconsin Department of Health and Family Services*, 264 Wis.2d 700 (Ct. App. 2003) directs that a transfer must be tested under general divestment provisions in addition to the requirements related to the specific form of the transfer. With regard to an annuity that met the value of the benefit test under § 49.453(4), the Court of Appeals noted:

As DHFS points out, subsec. (4) does not state that a transfer has been made for fair market value under subsec. (2)(a) so long as the asset transfer does not exceed the value of the benefit. Rather, it simply provides an additional requirement that is applicable only to irrevocable annuities.

* * *

Thus, we construe § 49.453 to require irrevocable annuity transactions, made on or after an individual's look-back date, to satisfy both subsec. (2)(a) and (4) in order for the institutionalized person to secure or retain medical assistance eligibility.

Likewise, whether Petitioner's promissory note meets Wis. Stat. § 49.453(4c) is not determinative.

Further, the Court of Appeals in *Estate of Gerald Gonwa v. Wisconsin Department of Health and Family Services*, 265 Wis. 2d 913 (Ct. App. 2003) held that regardless of whether the asset held in an irrevocable trust is transferred as an annuity, it is nevertheless held in an irrevocable trust. Similarly, it does not matter if Petitioner's transfer to the trust was made through a promissory note because it was still held in a trust.

I must now turn to whether the transfer to the [REDACTED] Irrevocable Trust was a divestment. The general divestment provision at Wis. Stat. § 49.453(2)(a) incorporates the federal law at 42 USC 1396p(c)(2) which states that a transfer will not result in ineligibility if the assets transferred to a trust are transferred to a trust established either for the sole benefit of a child of Petitioner's who is blind or permanently and totally disabled or for the sole benefit of a disabled individual under the age of 65. Neither is true of the F.F. Irrevocable Trust. Moreover, it is clear that the terms of the trust do not allow this trust to make payments to the individual as the petitioner acknowledges that the portion of the money for which there was no promissory note is a divestment. By failing to fit into an exception, Petitioner's transfer to the trust is a divestment.

What is most troubling about this case is that this transaction is not a fair market transaction. The fact that the petitioner had to funnel the money through a trust in order to execute the promissory note is further evidence that this is not a fair market transaction.

CONCLUSIONS OF LAW

The agency properly determined that \$55,115.63, which was placed in an irrevocable trust on December 9, 2014, is a divestment when there was a promissory executed from the trust to the petitioner on the same date.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

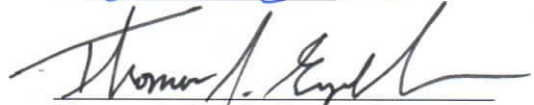
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 23 day
of October, 2015.

A handwritten signature in blue ink, appearing to read "Thomas J. Engels", is written over a horizontal line.

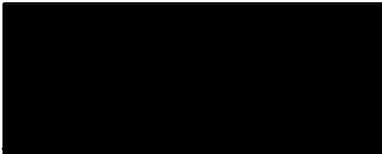
Thomas J. Engels, Deputy Secretary
Department of Health Services



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED DECISION

MDV/163634

PRELIMINARY RECITALS

Pursuant to a petition filed January 27, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on March 19, 2015, at Waukesha, Wisconsin.

The issue for determination is whether \$55,115.63, which was placed in an irrevocable trust on December 9, 2014, is a divestment when there was a promissory executed from the trust to the petitioner on the same date.

On May 15, 2015 I issued a decision dismissing the petitioner's appeal. I concluded that the statute and policy sections related to promissory notes did not apply to this case because \$55,115.63 was transferred into an irrevocable trust. Pursuant to the Medicaid handbook, App. 17.13.3. funds added to an irrevocable during the five year look back period are a divestment.

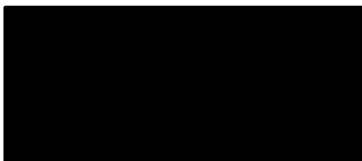
On May 20, 2015 the petitioner submitted a rehearing request. The rehearing request stated that it was a "fundamental error in law" not to consider that the promissory note met all of the requirements under state and federal statutes. They argued that this created a fair market value consideration for the transfer, and therefore it was not a divestment.

On June 17, 2015 I granted the rehearing request. I am issuing this decision proposed because the promissory note regulations and policies, if applicable, appear to be in conflict with the policy stating that any transfer of funds to an irrevocable trust is a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651

Madison, Wisconsin 53703

By: [REDACTED]

Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Corinne Balter

Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On December 9, 2014 the petitioner transferred \$119,115.93 from a [REDACTED] to the [REDACTED] Irrevocable trust.
3. On December 9, 2014 a promissory note was executed from the [REDACTED] Irrevocable trust to the petitioner in the amount of \$55,115.63. The promissory note had a .34% interest rate per annum, and provided for payments back to the petitioner in the amount of \$6200 per month beginning on January 9, 2015 and ending on September 9, 2015.
4. On December 22, 2014 E.R. sent a letter to Waukesha County economic support stating the following:

On 12-9-14 [the petitioner] transferred money from [REDACTED] to Irrevocable account at [REDACTED]. The amount was \$119,115.93. Of this amount \$55,115.63 was loaned with a promissory note, that starts paying back on 1/9/15.

The remaining balance is \$64,000.30, this is the divested amount.

We are looking for a NOD [Notice of Decision] showing the penalty period for the \$64,000.30.
5. On January 22, 2015 the agency sent the petitioner a notice stating the entire \$119,115.93 was a divestment, and that her penalty period was from 12/1/14 through 4/5/16.
6. On February 2, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

DISCUSSION

When an individual, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(a)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. This transfer is defined as a divestment. *Id.* The divestment must occur during the five year look back period. Wis. Stat. § 49.453(1)(f)(2m). Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment. The divestment penalty period is the determined by dividing the value of property divested by the average monthly cost of nursing facility services. Wis. Stat. § 49.453(3); *MA Handbook*, App. 17.5.

In this case the petitioner transferred money from a bank account to an irrevocable trust and executed a promissory note from the irrevocable trust to herself. This promissory note allowed for monthly payments in the amount of \$6200 to the petitioner with a .39% yearly interest rate. The payments were from January 2015 through September 2015.

I note that this promissory note only included a portion of the money transferred. The promissory note was for \$55,115.63, however, a total of \$119,115.93 was transferred from the bank account to the irrevocable trust. The petitioner admits that there is a divestment in the amount of \$64,000.30.

When one considers this case and whether this is a transaction for less than fair market value, it is important to consider that the divestment period on the admitted divestment of \$64,000.30. This divestment period very closely coincides with the length of payments on the promissory note. In other words the monthly payments from the promissory note plus any additional income cover the petitioner's nursing home care during the divestment period. At the end of this divestment period Medicaid coverage begins, and \$64,000.30 remains in the [REDACTED] Irrevocable trust. This is money that was originally transferred from the petitioner's bank account to the [REDACTED] Irrevocable trust, which then will never have to be used to pay for the petitioner's care. The effect of the petitioner's actions is to shorten the divestment period while shielding large portion of her assets.

The Medicaid Handbook states that funds added to an irrevocable trust during the five year look back period are a divestment. *MA Handbook*, App. 17.13.3. By transferring assets from a bank account to a trust, the person is transferring assets at less than fair market value. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. § 49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1.

In this case the petitioner also executed a promissory note from the irrevocable trust to the petitioner. The promissory note does not change the fact that money was transferred from a bank account to an irrevocable trust. The petitioner offers no legitimate reason for this transfer and promissory note.

I reviewed Wis. Stat. § 49.454(3)(b) and 42 U.S.C. 1396p(d)(3)(B)(ii) when deciding this case. Wis. Stat. § 49.454(3), which is nearly identical to the federal regulation provides:

TREATMENT OF IRREVOCABLE TRUST AMOUNTS. For the purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

- (a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:
 - 1. To or for the benefit of the individual, are considered income of the individual.
 - 2. For any other purpose, are considered transfers or assets by the individual subject to s. 49.453.
- (b) Any portion of an irrevocable trust from which, or any income on the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s. 49.453. The asset is considered to be transferred as of the date of the establishment of the trust, or if later, the date on which the payment to the individual was foreclosed. The value of the trust shall be determined for purposes of s. 49.453 by including the amount of any payments made from that portion of the trust after that date.

The transfer from the bank account to the irrevocable trust foreclosed the option of payment to the individual. It is clear that the terms of the trust do not allow this trust to make payments to the individual as the petitioner acknowledges that the portion of the money for which there was no promissory note is a divestment. The date the money was transferred, and the promissory note executed was December 22, 2014. This statute specifically states, "the value of the trust shall be determined for the purposes of s. 49.453 [divestment statute] by including the amount of any payments made from that portion of the trust after that date. *Id.* The payments to the petitioner began in January. This is after December 22, 2014, and thus under this statute are also considered a divestment.

The policy and statutes related to promissory notes do not apply to this case. The issue for this appeal is whether the portion of the transfer to the trust for which there is a promissory note is a divestment. I have found this is a divestment based upon the divestment rules for money transferred into an irrevocable trust. The divestment occurred when the money was transferred to the trust regardless of the promissory note. At the hearing there was some discussion of whether the promissory note was done after the money was transferred into the trust or if it was one simultaneous transaction. The petitioner's son was unable to or unwilling to answer questions related to the trust. He could not say what money if any was in the trust prior this transfer of \$119,115.93.

In the rehearing request the petitioner argues that disregarding the promissory note is a fundamental error in law. The petitioner goes on to argue that the transfer of the loan amount is not a divestment because the promissory note meets all of the criteria under Wis. Stat. § 49.453(4)(c). I agree with the petitioner that the promissory note meets the criteria under that statute. Had the petitioner executed the promissory note directly from the bank account to her son, for example, rather than transferring the funds to an irrevocable trust, then there would not be a divestment. The issue arises because the petitioner transferred money into an irrevocable trust.

If the laws and regulations related to promissory notes also apply when a person transfers money into an irrevocable trust, then those laws and regulations are in conflict with the policy sections related to the transfer of money to an irrevocable trust. The Medicaid Handbook states that funds added to an irrevocable trust during the five year look back period are a divestment. *MA Handbook*, App. 17.13.3. There is not a dispute that the petitioner transferred \$119,115.93 from her bank account to an irrevocable trust. The petitioner contends that I should ignore this policy section, and only consider the fact that the promissory note fits the requirements under Wis. Stat. § 49.453(4)(c).

What is most troubling about this case is that this transaction is not a fair market transaction. The fact that the petitioner had to funnel the money through a trust in order to execute the promissory note is further evidence that this is not a fair market transaction. For whatever reason, she chose to maneuver the transaction in this manner instead of creating a promissory note directly to her son.

CONCLUSIONS OF LAW

The agency properly determined that \$55,115.63, which was placed in an irrevocable trust on December 9, 2014, is a divestment when there was a promissory executed from the trust to the petitioner on the same date.

THEREFORE, it is

ORDERED

That the petition is dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 20 day of July, 2015

Corinne Balter / d

Corinne Balter
Administrative Law Judge
Division of Hearings and Appeals